(1) (9) of 1980

**IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR**

**S.A.No. 66 /2005** Single Bench

**APPELLANT**

DEFENDANT No.1

1. Smt. Priti Dubey, W/o. Shri Pradeep Dubey, Aged about 35 years, R/o. In front of Kankali Hospital, Tatyapara, Raipur (C.G.)

**V E R S U S**

**RESPONDENTS**

PLAINTIFF

1. Pramod Kumar Agrawal, Aged about 50 years, S/o. Late Shri Krishna Sewak Agrawal, R/o. Krishna Bhawan, Tamerapara, Durg, District Durg (C.G.)

P.R. No. 331/05 Presented by Shri Pramod Dubey dated 21.02.05

DEFENDANT No.2.

2. Subhash Inamdar, Aged about 55 years, S/o. Shri Haribhau Inamdar, R/o. Prasadhana Beutiparlor, Flat No.1, Kamla Sadan, In front of Kankali Hospital, Tatyapara, Raipur (C.G.).

**SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE**

(42) AFR

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Second Appeal No.66 of 2005**

Smt.Priti Dubey

Vs.

Pramod Kumar Agrawal

**JUDGMENT**

Post for 25.04.2005

Sd/-
Sunil Kumar Sinha
Judge

N.F
B.R.
25/4/05
(Maloy Kumar Bhadra)
N.F Counsel for R-1 04 relevant
25/4/05.

(43) A.F.R.

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Second Appeal No.66 of 2005**

Smt.Priti Dubey

Vs.

Pramod Kumar Agrawal

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Appearance:

Shri Anand Kumar Tiwari, counsel for the appellant.

Shri Malay Kumar Bhaduri, counsel for the respondent No.1 on Caveat Petition No.10/2005.

None for respondent no.2.

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**JUDGMENT**

(25.4.2005)

**Sunil Kumar Sinha, J,**

This appeal under section 100 of the Code of Civil Procedure has been directed against the Judgment and Decree dated 20.12.2004 passed in Civil Appeal No.11-A/2003 by the District Judge, Raipur (C.G) arising out of judgment and decree dated 01.2.2003 passed in Civil Suit No.132-A/2002 by the 3rd Additional Judge to the Court of First Civil Judge, Class-I, Raipur (C.G).

(2) Briefly stated facts are that the plaintiff namely Pramod Kumar Agrawal filed a civil suit for eviction in relation to a tenanted premises identified as Flat No.1 in building Kamla Sadan, Brahmanpara, Raipur. The plaint allegations are that this premises was given on monthly rent to defendant

no.1 for residential purposes under a written Agreement (Ex.P/1). It was being used for residential purposes through out. However, in the year 1995, the wife of defendant no.1 started the work of beautician in one part of the said premises which was objected by the plaintiff. It was not stopped but later on, defendant no.1 and his entire family left the city and from June 1995 defendant no.1 handed over the vacant possession of the suit premises to defendant no.2. This was done without prior permission of the plaintiff. Defendant no.2 also continued the business of beauty parlor in the said premises. Since the rented premises was not vacated even after notice of the plaintiff, the plaintiff was constrained to file the instant suit on the ground of sub-letting by defendant no.1 to defendant no.2 under section 12(1)(b) of the M.P. Accommodation Control Act (hereinafter referred to as 'the Act') and also on the ground of using of premises for a different purpose (for commercial purpose) which is inconsistent with the purpose (residential purpose) for which the tenant was admitted to the tenancy of the accommodation, under section 12(1)(c) of the said Act.

(3) The defendants filed their joint written statement denying the contentions of the plaintiff. It was contended by them that the said premises was taken on rent by defendant no.1 both for residential and commercial purposes. It was contended that the wife of defendant no.1 was doing the work of beautician in one portion of the premises and rest of the portion was used as

a residential building since long back and the plaintiff did not take any objection to it. About sub-letting it was specifically denied that defendant no.1 has given the premises on subletting to defendant no.2. It was also denied that defendant no.2 is running a business of beauty parlor in the name and style of *Prasadana Beauty Parlor* in the said premises.

(4) Learned trial Judge framed various issues in this case and after recording the evidence of the parties decreed the suit of the plaintiff on both the grounds i.e., grounds mentioned under section 12(1)(b) as well as 12(1)(c) of the Act. Against the aforesaid judgment and decree passed by the trial Court the defendants filed an appeal before the lower appellate Court, but the lower appellate Court dismissed their appeal confirming the judgment and decree passed by the trial Court.

(5) Having lost in both the courts below, defendant no.2 only (wrongly written as defendant no.1 in the memo of appeal) has challenged the legality of judgment and decree passed by the two courts below.

(6) The contention of learned counsel for the appellant is that both the courts below erred in law in holding that there was a change in the "purpose" for which the accommodation was taken on rent. He insisted that in fact, the premises was taken for residential as well as non-residential purposes and the finding in this regard that the premises was taken for

residential purposes only vitiates. He further argues that the sub-tenancy has not been proved and in fact, the landlord has been failed to prove that defendant no.2 is in exclusive possession of the rented premises and parting of possession by tenant was for monetary consideration. The finding of subletting is perverse and erroneous as passing of monetary consideration is also not established. Referring to para 21 of the evidence of the plaintiff, he also argues that in fact, there was some settlement between the plaintiff and defendant no.2 in relation to tenancy, therefore, in light of the said settlement, both the grounds of eviction frustrate and the plaintiff waives his right to retain the suit and defendant no.2 on such admission of the plaintiff, shall be deemed to be his tenant and shall not be subject to eviction. On these [redacted] grounds, learned counsel for the appellant prays for admission of the appeal by framing substantial questions of law.

(7) So far as the first ground regarding the use for different purpose is concerned, the pleadings of parties are important. The defendants have jointly contended that the premises was let out for residential as well as non-residential purposes and the wife of defendant no.1 was carrying on business of beautician in one portion of the premises and the family of defendant no.1 was residing in rest of the portion of the said premises. The agreement in relation to tenancy has been filed as Ex.P.1. Clause 14 of the agreement deals with the purpose and nature of tenancy which clearly indicates that the

accommodation was given on rent for residential purposes only. It has also been mentioned in this clause that except for residence no other business/occupation shall be carried out in the said premises. The trial Court has also dealt with the matter vide Para 8 of the judgment under discussion of issues no.1 and 3. This document (Ex.P.1) has been held to be proved and has not been disputed by the defendants. In light of the aforesaid clause in the lease deed it has been held that the premises was given for residential purposes only, the plea taken by the defendants that the same was given for residential as well as non-residential purposes has been rejected.

(8) Relying on decision of the Apex Court reported in ***AIR 1978 S.C. Pg.1601 (Santram, appellant -Vs- Rajinder Lal and others)***, learned counsel for the appellant argues that if in a portion of rented premises for residential purpose, business of beautician is done, it cannot be held that there was a change of user and the premises was used for a different purpose. The aforesaid judgment of the Apex court is not on this point. The judgment relates to the manner of determination of purpose, commercial or commercial-cum-residential, in a matter when the "purpose" is not disclosed in the lease deed. In the said case, the appellant, a Harijan Cobbler was a lessee of the small portion of a shop in *Shimla*. The lease deed disclosed no purposes. The suit was filed on the ground that the premises was being used for a purpose other than one for which it was let out. The appellant on some days cooked his food and

stayed at night in the rear portion of the shop. It was said by the Apex Court that it could not be held that the purpose was exclusively commercial and incompatible with any residential use, even of a portion. The legal inference to be drawn from a lease deed was conditioned by prevailing circumstances. The intention of the parties from which the purpose of the lease was spelled out was to be garnered from the social milieu. The Apex Court further held that it is impossible to hold that, if a tenant, who takes out petty premises for carrying on a small trade, also stays in the rear portion, cooks and eats, he so disastrously perverts the purpose of the lease. A different purpose in the context is not minor variations but majuscule in mode of enjoyment. This was not a case of a man switching over to a canteen business or closing down the cobbler shop and converting the place into a residential accommodation.

The case in hand is totally on a different footing. Here the lease deed clearly disclosed the purpose and it says that the tenancy shall be for the residential purpose only. It specifically prohibits any business in the premises. The case is also not like this, that in a portion of shop, a person starts residing for the purpose of his business. Here the case is just opposite that in a specified residential accommodation, the tenant has permanently started a business of beauty parlor. The judgment of the Apex Court is distinguishable on these points and the argument of the learned counsel for the appellant cannot be sustained.

(9) If we further examine the case for change of user, we find that suggestions were given by the defendants in the cross examination of the plaintiff that in fact, the settlement between plaintiff and defendant no.2 was arrived at and the talks of said settlement has taken place in the *Prasadana Beauty Parlor* of defendant no.2. This also goes to show that the premises initially handed over for residential purpose to defendant no.1 in accordance with the written lease deed was being used by the defendants for residential-cum-commercial purposes which goes against clause 14 of the lease deed. The trial Court as well as the appellate Court have gone into these facts in detail and have recorded a concurrent finding which is based on positive evidence on record and the same cannot be held to be erroneous or perverse. This argument fails and the same cannot be sustained.

(10) Now coming to the next question of sub-letting, learned counsel for the appellant submits that as an effect of the settlement between the landlord and defendant no.2, as per admission of the landlord vide Para 21 of his evidence, the landlord waives the right of eviction on the ground of subletting.

This argument of learned counsel cannot be sustained. First of all, no such plea of retaining the possession on the basis of settlement or an agreement between the plaintiff and defendant no.2 has been taken in the written statement by the defendants. The defendants have come with a case that neither

defendant no.1 has left the possession nor he has parted the possession of the premises with defendant no.2. In fact, the possession was with defendant no.1 and not with defendant no.2.

Admittedly, this new ground is being taken in the second appeal for the first time which cannot be allowed to be raised by the parties at this stage. The law on the point of waiver is well settled. The waiver is a question of fact which must be expressly pleaded and clearly proved. No such plea has been raised either by the tenant or by the sub-tenant before the courts below. The provisions of the Act are very clear. Section 14 of the Act provides that no tenant can sub-let the tenanted premises or part thereof without the written consent of the landlord. If the sub-letting is proved, a belated and bald plea of waiver which has not been pleaded in the written statement cannot defeat the statutory provision made in the larger public interest. It has been held by the ***Apex Court in the matter of Pulin Beharilal -Vs- Mahadeb Dutta and others reported in (1993) 1 SCC 629*** that a mere knowledge of subletting and/or acceptance of rent cannot defeat the landlord's right to get a decree for ejectment on the ground of subletting. It has been further held that to establish waiver of benefit conferred by provisions of statute, conscious relinquishment of such benefit has to be proved. Even otherwise also, said admission in para 21 of the evidence of plaintiff does not give rise to any such situation which may show that in fact, the premises was willfully rendered to the

possession of defendant no.2 by the plaintiff under some settlement and on the face of such admission, the plaintiff cannot retain a suit for eviction. The admission in the cross examination only goes to show that some settlement was arrived at between the plaintiff and defendant no.1 but what was that settlement has not been cleared.

(11) Regarding subletting, the law is well settled. It has been observed by the Apex Court in the matter of ***Associated Hotels of India Limited –Vs- S.B.Sardar Ranjit Singh reported in AIR 1968 S.C. 933*** that in a suit by the landlord for eviction of tenant on the ground of subletting, the landlord has to prove by leading evidence that (i) a third party was found to be in exclusive possession of the rented premises/property and (ii) parting of possession thereof was for monetary consideration. This principle has further been reiterated in the matter of ***Shama Prashant Raje –Vs- Ganpatrao & others., (2000) 7 SCC 522*** that in the subletting 2 ingredients must be established, (i) parting with possession and (ii) payment of some consideration therefor.

(12) It has been further held by the Apex Court in the matter of ***Bharat Sales Ltd., -Vs- Life Insurance Corporation of India, (1998) 3 SCC Pg.1*** that :

> *"Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the*

*tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let."*

(13) In the matter of ***Smt.Rajbir Kaur and another –Vs- M/s. S.Chokesiri & Company,(1989) 1 SCC 19***, the Apex Court held that if the exclusive possession is established, and the version of the respondents as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the Court to draw an inference that the transaction was entered into with monetary consideration in mind.

(14) It has been further held by the Apex Court in the matter of ***Kala and another –Vs- Madho Prasad Vaidya (1998) 6 SCC 573*** that the burden of proof of subletting is on the landlord but once he establishes parting of possession by the tenant to third party, the onus would shift on the tenant to explain his possession. If he is unable to discharge this onus it is permissible for the Court to raise an inference that such possession was for monetary consideration.

(15) The apex Court has also held in the matter of ***Joginder Singh Sodhi –Vs- Amar Kaur reported in 2005(1) S.B.R. 97*** that the proof of ~~burden~~ payment of monetary consideration by sub-tenant to the tenant is not a sine qua non to establish subletting.

(16) On the basis of above principles of law, if we examine the case on hand for the purposes of subletting, we find that a definite finding in relation to sub-letting has been recorded by the two courts below. The arguments advanced by learned counsel for the appellant that on the basis of admission of the plaintiff vide para 21 of his evidence, he waives the right of eviction on the ground of sub-tenancy cannot be sustained. As has been held by the Apex Court, waiver is a question of fact which must be expressly pleaded and proved. No such plea has been taken by the defendants even by way of amendment after the said cross examination either before the trial Court or before the first appellate Court. This question cannot be

allowed to be raised for the first time in this Court. Such vague admission which is not at all clear, cannot defeat the provisions laid by the statute. If, in fact, the landlord had agreed to give the rented premises in the tenancy of defendant no.2 and the defendant no.2 was holding the possession of rented premises on the basis of any such agreement between the landlord and herself and a new tenancy was created between herself and the landlord, it was incumbent upon her to take this plea in the written statement and to come with a definite case of holding the possession of premises on the basis of the alleged new tenancy. This is not the case of defendant no.2, rather on the contrary, she has filed the written statement that she has not parted with the possession of the rented premises and in fact, the actual physical possession was in the hands of defendant no.1. If we examine the entire case, the scenario regarding possession of the tenanted premises is well clear. The trial Court as well as the first appellate Court have recorded a definite finding that the tenanted premises is being exclusively possessed by defendant no.2. No suitable explanation regarding dispossession has been brought on record, therefore, the courts were free to draw their own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises was sub-let to defendant no.2 by defendant no.1.

(17) I do not find any force in the argument advanced by the learned counsel for the appellant at this stage. The question of

subletting has been proved in accordance with law and there is no infirmity in the same. The apex Court has held in case of ***Shama Prashant Raje,*** referred to above, that the question of subletting is not a pure question of fact, but it can be held to be the mixed question of fact and law. There is a concurrent finding of the two courts below in relation to the above question and the same cannot be disturbed in the second appeal under section 100 of the Code of Civil Procedure.

(18) A perusal of section 100 C.P.C. makes it clear that the scope and exercise of jurisdiction by the High Court in the second appeal under section 100 is limited to the substantial questions of law framed at the time of admission of the appeal or additional substantial questions of law framed at the later stage after recording reasons for the same. This makes it clear that the existence of substantial questions of law is *sine qua non* for the exercise of jurisdiction under the amended provisions of section 100 C.P.C. (***Please see (2004) Vol.V SCC 762 – Thiagarajan and others –Vs- Sri Venugopala Swamy B. Koil and others)***

(19) As to which would constitute a substantial question of law, it has been observed by the Apex Court in case of ***Santosh Hazari –Vs- Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179*** that :

> *"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously*

*settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."*

***(Emphasis supplied)***

(20) I do not find any reason to interfere in the concurrent findings recorded by the two courts below as the counsel for the appellant could not point out any perversity in the aforesaid findings, either on the question of change of user or on the question of subletting. This appeal involves no substantial question of law and the same cannot be entertained. The appeal stands dismissed. There shall be no order as to costs. The caveat petition bearing No.10/2005 also stands disposed of.

**Sd/-**
**Sunil Kumar Sinha**
**Judge**

25.04.2005

/Rao/